Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of WorldCom, Inc. and	)	
MCI Communications Corporation for	)	CC Docket No. 97-211
Transfer of Control of MCI Communications	)	
Corporation to WorldCom, Inc.	)	

TO THE COMMISSION

PETITION TO DENY

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The Rainbow/PUSH Coalition ("Rainbow/PUSH"), pursuant to §§208(a), 214(d), and 309(d)(1) of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 and §§63.52(c) and 73.3584 of the FCC's Rules and Regulations, respectfully requests the Commission to designate the above referenced applications, as amended November 21, 1997, including those set out in the margin,1/ (collectively, the "application") for evidentiary hearings, and, based on the evidence expected to be adduced at these hearings, to deny the application.2/

SUMMARY

As presented to the Commission and the public, the WorldCom/MCI merger is not good for America. It is unlikely to comply with America's communications, antitrust and equal opportunity laws. In this Petition to Deny, the Rainbow/PUSH

1/ The applications being challenged herein include all of those seeking assignment of MCI's Title II and Title III radio licenses and authorizations and cable landing licenses. These include all of MCI's authorizations for "international wireline facilities, and a variety of wireless facilities, including point-to-point microwave stations, earth station licenses, private telephone maintenance radio service licenses, private business radio licenses, private aircraft stations licenses, and an 800 mHz air-ground radiotelephone license...used to provide voice and video services....[as well as] submarine cable landing licenses and a direct broadcast satellite (DBS) license." <u>In the Matter of the Merger of MCI Communications Corporation and British Telecommunications plc (MO&O)</u>, 12 FCC Rcd 15351, 15361 ¶21 (1997) ("<u>BT/MCI Order</u>"). The applications being challenged here are specifically identified in the Public Notice, "WorldCom, Inc. and MCI Communications Corporation Seek FCC Consent For Proposed Merger," DA 97-2494 (released November 25, 1997) ("Public Notice") at 3-5, which is incorporated herein by reference.

2/ MCI Communications Corporation is referred to herein as "MCI". WorldCom, Inc. is referred to as "WorldCom", and the proposed merged entity is referred to as "MCI WorldCom". The use of the term "MCI WorldCom" herein is for convenience only, and does not imply that such an entity is lawfully entitled to be a Commission regulatee.

Coalition asks the Commission to require a more thorough statement of the companies' plans for their merger, allow public comment on these plans, designate the application for hearing and deny the application.

JURISDICTION

The Commission has personal jurisdiction over the applicants, 47 U.S.C. §§214(a), 307, 308 and 309, and it has subject matter jurisdiction over the allegations in this Petition, 47 U.S.C. §§202(a), 214(a), 215(a), 215(c), 254(b), 257, 303(f), 303(g), 307(a) and 307(c).

This Petition contains "specific allegations of fact sufficient to show...that a grant of the application[s] would be _prima facie_ inconsistent with [the public interest, convenience and necessity]." 47 U.S.C. §309(d)(1); _Astroline Communications Co. v. FCC_, 857 F.2d 1556 (D.C. Cir. 1988); _Dubuque T.V. Limited Partnership_, 4 FCC Rcd 1999 (1989).

The allegations herein, except those of which official notice may be taken, are supported by the declarations under penalty of perjury of a person with knowledge of the facts alleged and attesting to Rainbow/PUSH's interest in the matter. 47 U.S.C. §309(d)(1); _see_ 47 CFR §1.16. Appended hereto is a declaration in the customary form, under penalty of perjury, from Rev. Jesse L. Jackson, Sr., Founder and President of the Rainbow/PUSH Coalition. Rev. Jackson, a resident of Chicago and Washington, D.C., is a local exchange and long distance customer at each of his residences, where he receives and can transmit voice and data which travel over MCI and WorldCom facilities. _See_ _Maumee Valley Broadcasting, Inc. (MO&O)_, 12 FCC Rcd 3487, 3488-89 ¶¶4-6 (1997) (reconsideration pending) (prerequisite for standing is one's ability to receive transmissions from Title III licensee at one's home). Rainbow/PUSH is a local exchange and long distance customer at its New York, Chicago and Washington, D.C. offices, and in each office it receives and can transmit voice and data which travel over MCI and WorldCom facilities. Moreover, Rainbow/PUSH owns stock in both MCI and WorldCom, and is thus harmed by unbusinesslike, profit-inhibiting behavior of the companies in their suboptimal treatment of the huge market opportunities presented by the Black, Brown, middle and low income communities. Thus, Rainbow/PUSH has standing. American Legal Foundation v. FCC, 808 F.2d 84 (D.C Cir. 1987); Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); see also AmericaTel Corporation, 9 FCC Rcd 3993, 3995 ¶9 (1994) (citing Sierra Club v. Morton, 405 U.S. 727 (1972)); Petition for Rulemaking to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application, 82 FCC2d 89 (1980) (citing Warth v. Seldin, 422 U.S. 490, 511 (1975)).

Furthermore, this petition is timely and ripe for review, 47 U.S.C. §309(d)(1) and 47 CFR §§63.52 and 73.3584(a), and it complies fully with the Commission's rules governing pleadings, 47 CFR §1.48, 1.49, 1.51 and 1.52, petitions to deny, 47 CFR §§63.52(c) and 73.3584, and service of process, 47 CFR §1.47.

Consequently, Rainbow/PUSH has met all jurisdictional requirements, and its allegations must be fully considered on the merits.

I. Federal Intervention In The Merger Is Necessary To Protect The Public Interest

When companies propose to merge, they would save the Commission and the public a considerable time and expense if they would lay all of their plans openly on the table. For example, the Commission's analysis of the Bell Atlantic/NYNEX merger "would have been greatly assisted by a fuller description of [Bell Atlantic's] actual plans, even if Bell Atlantic believed those plans were irrelevant." NYNEX Corporation and Bell Atlantic Corporation (MO&O), FCC 97-286 (released August 14, 1997) ("Bell Atlantic/NYNEX Order") at 113 ¶243.

The same can be said of the WorldCom and MCI, who have truly filed a stealth application. The application stands mute on virtually all of the major public interest issues attendant to mergers of this nature and size, including the potential for redlining, cream-skimming and discrimination. Commission review is necessary to protect the public because the companies have not manifested any interest in addressing these issues voluntarily.3/

The merger application does not contain a word addressing how the merged company will eliminate discrimination and promote fair trade. The Commission must investigate the merger proposal thoroughly in order to fulfill the Telecommunications Act's requirement that the FCC make an affirmative determination that

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3/ On December 12, 1997, to afford the companies an early opportunity to explain their plans and possibly adjust or modify them, Rainbow/PUSH President Rev. Jesse L. Jackson, Sr. wrote to the CEO's of both companies, seeking to open a dialogue regarding the companies' plans. MCI provided a perfunctory response which expressly refused to address any of the issues Rainbow/PUSH had raised. WorldCom did not respond at all, even to acknowledge the correspondence.

approval of such mergers would serve the public interest. The Commission has full authority to perform such an investigation. 47 U.S.C. §§208(b)(1), 218, 219(b) and 309(a).

At a minimum, the Commission cannot approve the merger until it is able to find that the benefits flowing from what might be greater competition in the local markets materially outweigh the public interest costs associated with greater concentration in the long distance market.4/ As the Commission recently held in evaluating a smaller merger:

> A merger will be pro-competitive if the harms to competition -- i.e. enhancing market power, slowing the decline of market power, or impairing this Commission's ability properly to establish and enforce those rules necessary to establish and maintain the competition that will be a prerequisite to deregulation -- are outweighted by benefits that enhance competition. If applicants cannot carry this burden, the applications must be denied.

Bell Atlantic/NYNEX Order at 3 ¶2. If the Commission is unable to develop specific findings of tangible benefit, hearings or a supplementary inquiry may be necessary. Hawaiian Tel. Co. v. FCC, 49 F.2d 771 (D.C. Cir. 1974).

4/ See BT/MCI Order at 15357 ¶10 (where a merger "is likely to benefit competition in certain relevant markets and harm competition in other relevant markets...we would need to balance the relative expected beneficial and harmful competitive effects, taking into account the relative size and importance of the markets involved, and the relative impact on U.S. consumers.") Rainbow/PUSH notes, though, that the contention that unlawful concentration in one market can be overlooked on the basis of potential competition in another market is questionable at best. See U.S. v. Phillipsburg National Bank, 399 U.S. 350 (1970) ("Phillipsburg Bank") (holding that severe anticompetitive effects in banking in one geographic market cannot be counterbalanced by a presumed procompetitive effect in a wider geographic market.)

WorldCom and MCI might respond to this Petition by contending that the issues raised herein are "social" or "diversity" concerns and are thus irrelevant to the operation of a common carrier. Such a contention would be without merit. WorldCom and MCI both use Title III facilities as well as Title II facilities, and diversity is always relevant in considering Title III applications.5/ Moreover, issues of redlining, discrimination, cream-skimming, trade and inclusion are not only germane to diversity: they go to

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5/ The fact that a particular Title III license is not used to "broadcast" does not detract from the Commission's Title III authority to promote diversity. For example, the Commission has long found authority to promote diversity in its regulation of CARS licenses employed by cable television systems, even though consumers at home do not directly receive these microwave transmissions. See, e.g., Prime Cable, 4 FCC Rcd 1696 (1989), affirmed, 5 FCC Rcd 4590 (1990).

It could be contended that diversity concerns attach to CARS applications only because CARS is ancillary to a broadcast-like service, cable television. However, common carrier and broadcasting are converging rapidly, and common carriers are increasingly involved in offering broadcast-like services over their wires and over the Internet. The business environments of Title II and Title III services already overlap substantially; for example, companies which lay fiber serve both telephone and cable companies; and technical and sales employees in Title II industries possess qualifications desired by firms in Title III industries, and vice versa. As the Commission has recognized, "the current EEO enforcement and regulatory structure [which] focuses mainly on broadcasters and cable television operators" is out of step with the convergence to digital technology. Implementation of the Commission's Equal Employment Opportunity Rules (Report), 9 FCC Rcd 6276 6317 ¶91 (1994), and common carrier EEO enforcement "may be justified given the convergence of telecommunication technologies, which increasingly will subordinate the importance of the means of delivery of telecommunications services to the actual technologies and services provided to the public." Id. at 6318 ¶92.

Thus, diversity is a public interest rationale for common carrier as well as broadcast regulation. Congress recognized this when it enumerated the policies the Commission should foster in its efforts to eliminate market entry barriers as "diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience and necessity" (emphasis supplied). 47 U.S.C. §257(b).

the heart of the business relationship between the company and its subscribers. As the Commission found in the Bell Atlantic/NYNEX Order, competition is not the only public interest factor to be considered when mergers arise: "Commission analysis of the effect of the transfer on competition is informed by antitrust principles, but not limited by the antitrust laws." Id. at 19 ¶32 (fns omitted), and citing, inter alia, Capital Cities/ABC, Inc., 11 FCC Rcd 5841, 5885-95 ¶¶82-99 (1996) for the principle that the "public interest includes concerns regarding diversity and concentration of economic power". Bell Atlantic/NYNEX Order at 19 ¶67; see also Triathlon Broadcasting of Little Rock Licensee, Inc., 12 FCC Rcd 13907, 13914 n. 10 (1997). The benchmark for evaluating these economic and social issues is the Commission's "duty to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities...." Teleprompter and Group W, 87 FCC2d 531, 541 ¶21 (1981), aff'd, 89 FCC2d 417 (1982).6/

6/ The "concentration of economic power" in the hands of White males continues to be an impediment to the participation of minorities in the mainstream of commerce. Congress recognized this when it adopted Section 309(j)(4)(D) of the Act, providing that the Commission should "ensure that...businesses owned by minorities and women are given the opportunity to participate in the provision of spectrum-based services." The Commission has found in Section 309(j)(4)(D) the broad authority to require common carriers to adhere to EEO requirements in order to "provide increased communications experience for minorities and women. This experience will, in turn, enable them more easily to become owners of communications enterprises." Regulatory Treatment of Mobile Services (Third Report and Order), 9 FCC Rcd 7988, 8098 ¶232 (1994).

WorldCom and MCI might also contend that even if the Commission may consider "social" issues in reviewing this transaction, the structure of the transaction is not an appropriate vessel for addressing those issues. However, the Commission has long recognized that structure is closely linked to social equity. For example, in Amendment of Section 73.3555, 4 FCC Rcd 1741, 1742, modified on reconsideration, 4 FCC Rcd 1489 (1989), the Commission explained that "[t]he ultimate objective of the [broadcast multiple ownership] rule[s] is to enhance consumer welfare through the promotion of economic competition and diversity of programming."

Race-related issues, including discrimination, redlining and cream-skimming, are a necessary component of any meaningful social equity review of the competitive impact of a major merger.[7/] By revising Section 151 of the Communications Act to expressly provide for nondiscrimination on the basis of race, Congress was directing the Commission to affirmatively prevent race discrimination when it

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7/ The legislative history of Section 257 of the Act (Market Entry Barriers) indicates that Congress recognized a nexus between minority ownership and competition:

> minority and women-owned small businesses continue to be extremely under represented in the telecommunications field....Underlying [Section 257] is the obvious fact that diversity of ownership remains a key to the competitiveness of the U.S. communications marketplace.

142 Cong. Rec. H1141 at H1176-77 (daily ed. Feb. 1, 1996) (Statemment of Rep. Cardiss Collins).

regulates telecommunications services.[8/] Along the same lines, among the President's fundamental principles for telecommunications policy is "preserving and advancing universal service to avoid creating a society of information 'haves' and 'have nots'."[9/]

8/ In 1934, Congress created the FCC for the purpose of "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges. 47 U.S.C. §151 (1934). The version of Section 151 in the Telecommunications Act adds, after the words "all the people of the United States", the words "without discrimination on the basis of race, color, religion, national origin, or sex". See 47 U.S.C. §151 (1996). The new, 1996 language did not limit the Commission's jurisdiction to "intentional" discrimination. Thus, the Commission's jurisdiction is not so attenuated as to exclude consideration of the many forms of discrimination as to which deliberate intent could never be proved. The reason this language should be given the most expansive possible reading is that the Commission has affirmative public interest obligations, flowing from Sections 214 and 309 of the Act, which include avoiding the ratification or validation of all forms of discrimination.

An excellent example of the Commission's recognition of the expansive nature of its authority to prevent discrimination in every form is found in Walton Broadcasting, Inc., 78 FCC2d 857 (1980) ("Walton"). In Walton, a broadcaster relied principally on "word of mouth" contacts by its virtually all-White staff to recruit new potential staff members. In a decision written by Chairman Ferris, the Commission held that such "word of mouth referral from a predominately white work force,...while unintended, effectively discriminated against minority group employment." Id. at 875 ¶48.

9/ White House, Administration White Paper on Communications Act Reforms, January 27, 1994. The Department of Education has recognized that we are well on our way to becoming a society of information "haves" and "have-nots". In 1996, the Department found that schools in with predominately White student bodies are much more likely than schools with predominately Black or Brown student bodies to have Internet-access computers in their classrooms. National Center for Education Statistics, U.S. Department of Education, "Advanced Telecommunications in U.S. Public Elementary and Secondary Schools, 1995", Report NCES-96-854 (February, 1996).

Moreover, a relevant factor under the public interest standard is "the complexity and rapidity of change in the industry." Bell Atlantic/NYNEX Order at 20 ¶32. Thus, the Commission must take into account the disappearance of incentives for minority entrepreneurship flowing from the concentration-stimulating provisions of the Telecommunications Act of 1996, as well as other new developments inhibiting minority participation in the mainstream of American commerce and threatening the Commission's ability to achieve the full integration of telecommunications service and the telecommunications business environment.[10/] The only remedy immediately available to the Commission is heightened scrutiny of industry-transforming merger applications such as this one.

Finally, WorldCom and MCI might respond to this Petition with a display of head-scratching or feigned indignation. How dare anyone suggest that they might cream-skim, redline, disregard business opportunities in minority communities, fail to build antidiscrimination protections into their plans to lay off thousands of workers, or fail to integrate their board and the

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10/ A new wave of state initiatives and court decisions is preventing minorities from receiving college educations, law degrees and government contracts. See, e.g., California Proposition 209 (1996); Adarand Constructors, Inc. v. Peña, 515 U.S, 200 (1995) ("Adarand"); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Hopwood v. State of Texas, 78 F.3d 932 (5th Cir.), cert. denied, 116 S.Ct. 2580 (1996). Communications has not been immune from this trend: after Adarand was issued, the Commission revised its designated entity rules to remove race and gender-based incentives in the broadcast C block auction. Implementation of Section 309(j) of the Communications Act -- Competitive Bidding (Sixth Report and Order), 11 FCC Rcd 136, 142-66 ¶¶10-57 (1996). In addition, Congress' 1995 repeal of the tax certificate policy has profoundly inhibited the Commission's ability to promote minority entrepreneurship in Title III services.

ranks of senior management? Where is the proof? Trust us now, they will say, and if we violate the public trust, complain to the FCC then.

That is precisely the wrong way for a regulatory agency to approach a merger of this type -- the largest business transaction in the history of mankind. These companies already know exactly what their plans are -- otherwise, they could never have agreed upon the $41.8 billion price for the deal. Long term strategic planning always occurs upon the occasion of a merger. Right now is the best time to ask whether these applicants are doing all they can to realize the economic potential of all sectors of the population and provide service on equal terms and conditions to all consumers. Indeed, if the applicants complete their merger without being told that they may not cream-skim, redline and discriminate -- and they are <u>later</u> told not to do these things -- they would inevitably complain (with some force) that the Commission should have made its expectations known <u>before</u> $41.8 billion was invested and tens of thousands of lives were restructured. MCI WorldCom could contend that had it known of the Commission's objections earlier, it could have revised its plans before the closing and avoided the need for expensive restructuring later. It could contend that being forced to undergo an expensive post-merger restructuring would cause serious competitive harm, or could even delay the delivery of services the Commission desires to have implemented. It could certainly ask that any costs of that restructuring must be passed on to the ratepayers.

Thus, the public is far better served if the Commission tells WorldCom and MCI <u>now</u> what it expects of them. It can do this in any of three ways.

First, it can call in the parties and encourage them to voluntarily negotiate public interest commitments.11/

Second, it can impose public interest conditions on its own motion.12/

Third, it can designate the application for hearing and deny it.13/

11/ The Commission has encouraged "prospective merger partners to make pro-competitive commitments, whose likely effect in enhancing competition in some or all relevant markets outweighs the likely harmful effects that are expected to occur by reason of the merger." BT/MCI Order at 15357 ¶10 (fn. omitted). It has noted that such commitments may tip the balance in a close case, enabling the Commission to "find it in the public interest, convenience and necessity to approve the merger." Id.; see also Bell Atlantic/NYNEX Order at 9 ¶14. Such commitments are "binding upon the Applicants" and are enforceable through complaints pursuant to Section 208 of the Act or oppositions to future applications for radio licenses under Section 309 or for certificates of convenience and necessity under Section 214. Bell Atlantic/NYNEX Order at 92 ¶191; see Central Television, Inc. v. FCC, 834 F.2d 186, 190 (D.C. Cir. 1987), citing Willard Shoecraft (KINO), 3 FCC2d 775, 776 (1966) ("[a]cceptance of a grant, with any attendant conditions, is presumed if no rejection occurs within thirty days of the grant's issuance.") The Commission itself can appropriately be involved in this process, as it is when it negotiates social contracts with cable systems.

12/ The Clayton Act permits the FCC to issue a cease and desist order and negotiate through a consent order such conditions as the public interest may require. 15 U.S.C. §21(b) (1997); see Bell Atlantic/NYNEX Order at 17 ¶29 and n. 57. The Communications Act also authorizes the Commission to attach "such terms and conditions as in its judgment the public interest, convenience and necessity may require" to any certificate the Commission must issue under 47 U.S.C. §214(a) as a predicate to acquisition of any line by a common carrier. 47 U.S.C. §214(c); see, e.g., MCI Communications Corp., 9 FCC Rcd 3960, 3968 ¶39 (1994). The Commission may also grant with conditions any Title III application, 47 U.S.C. §303(r) and 47 CFR §1.110.

13/ The Commission must deny or designate a Title III application for hearing if there is an unresolved material question of fact. 47 U.S.C. §309(e). See, e.g., Tele-Media Corp. v. FCC, 697 F.2d 409 (D.C. Cir. 1983).

It is well established that the proponents of a transaction requiring a rule waiver or other special treatment -- not its challengers and not the Commission -- bear the burden of demonstrating that the transaction serves the public interest. As the D.C. Circuit observed in WAIT Radio v. FCC, 418 F.2d 1153, 1157-1158 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972), "[a]n applicant for waiver faces a high hurdle even at the starting gate....The very essence of waiver is the assumed validity of the general rule, and also the applicant's violation unless waiver is granted." See also Bell Atlantic/NYNEX Order at 2 ¶2; American Telephone and Telegraph Co. and MCI Communications Corporation Petitions for the Waiver of the International Settlements Policy, 5 FCC Rcd 4618, 4621 ¶19 (1990). An applicant for a $41.8 billion transaction cannot evade review by adopting a strategy of controlled silence any more than it could scheme to evade review by engaging in deliberate misrepresentations.14/ The Commission must compel applicants to provide the public with sufficient information to evaluate all public interest aspects of their proposed transactions. Stone v. FCC, 466 F.2d 316, rehearing denied, 466 F.2d 331, 332 (D.C. Cir. 1972) (holding that consumers without access to material facts in the sole possession of a broadcast renewal applicant may perceive the renewal process as "a meaningless exercise or a never-ending battle for which [they] have insufficient resources.")

14/ Cf. RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981) ("the Commission is not expected to play procedural games with those who come before it in order to ascertain the truth[.]")

The sole obligation of petitioners to deny is to raise substantial and material questions of fact.[15] We ask herein:

1. Will the net public interest benefits which may or may not flow from entry of MCI WorldCom into local markets materially exceed the net public interest costs associated with greater concentration in the long distance market? See §II, pp. 15-21 infra.

2. Does MCI WorldCom intend to remain in the long distance residential business? If so, will it market aggressively to attract middle and low income customers, or will it focus primarily on the high-end market? Does MCI WorldCom intend to enter the local residential business? See §§II and III(A), pp. 15-26 infra.

3. When and if it enters local residential markets, will the merged company build local switches in minority communities or simply resell the services already provided by the incumbent local exchange company? Will its buildout plans, following the pattern historically employed by many local companies, begin with wealthy suburban and outer ring neighborhoods and end with lower income, inner city communities? See §III(A), pp. 22-26 infra.

4. Will the merged company offer low and middle income business and residential customers the same range of rates and incentives it offers to high end customers, or, as so often happens, will "the poor pay more?" Will all rates and plans be openly disclosed in lay terms to all customers? See §III(A), pp. 22-26 infra.

5. Will the level of customer service provided to low and middle income residential customers equal the level of service provided to wealthy residential customers and to business customers? See §III(A), pp. 22-26 infra.

6. If the business plan for this merger contemplates firing or laying off workers, what protections will be implemented to insure that these layoffs do not disproportionately target minorities? Will layoff criteria employ an algorithm which incorporates, ratifies and validates the effects of past employment discrimination? See §III(B), pp. 26-27 infra.

15/ See Citizens for Jazz on WRVR, Inc. v. FCC, 775 F.2d 392, 397 (D.C. Cir. 1975) ("[i]t would be peculiar to require, as a precondition for a hearing, that the petitioner fully establish... what it is the very purpose of the hearing to inquire into.")

7. Is the business relationship between MCI and small and minority resellers fair in every respect? See §III(C), pp. 28-31 infra.

8. If the merged company will outsource many functions currently performed in-house (e.g. billing and collections), will minority entrepreneurs receive a reasonable share of the outsourced contracts? Will the merged company affirmatively pledge a reasonable share of its contracted business to minority firms? See §III(C), pp. 28-31 infra.

9. How in the world can an entity seeking to become America's dominant telecommunications venture serve the nondiscrimination and diversity-promoting goals of Section 151 of the Act without plans to include minorities or women on their board or in their senior management? See §IV, pp. 31-32 infra.

The Commission's review of these questions should be free of "the disease 'Big-Guy Myopia'" which may cause the Commission to "write one-size-fits-all policies based on the experiences, data, and promises of the big guys, [to] short-sightedly cut deals with one or two large companies, and, fatally [to] measure the success of competition, new market entry, innovation of services, and prices by what these giants are doing."16/ The Commission should trust its instinct to protect small and minority business and consumers.

II. The Merger Is Inherently Anticompetitive

In June, 1997, Rev. Jackson asked the FCC to disallow any media or telecommunications transaction which does not "serve the public interest by impacting positively on minority ownership and diversity of voices and viewpoints." Letter to Hon. Reed Hundt from Rev. Jesse L. Jackson, June 4, 1997. The proposed WorldCom/MCI merger presents a best case for the type of merger the FCC should not approve in the form presented by the applicants.

16/ Address of Hon. Michael K. Powell Before America's Carriers Telecommunications Association, McLean, VA, December 15, 1997, p. 5.

The merger has been presented to the Commission without any credible showing of how it will promote competition in the long distance market. Indeed, such a showing is impossible. The central fact in considering the merger is that it removes the fourth largest long distance competitor. The merger would convert an industry the Commission wishes to become more competitive -- with three large stable firms and one fast-growing upstart threatening their status -- into essentially a three-stable-firm cartel with no viable upstart in the wings.

Evaluating horizontal concentration is not difficult. Section 7 of the Clayton Act declares illegal any merger which, in any "line of commerce" or "section of the country" may "substantially" lessen competition or tend to create a monopoly. 15 U.S.C. §18. The Justice Department's Antitrust Division assumes that pre- and post-merger market structure, as evaluated by "concentration levels", are the best evidence of whether a merger will "substantially" lessen competition.

The standard measure of concentration is the Herfindahl-Hirschman Index (HHI), which "is typically used as a 'screen' to identify cases in which a merger significantly aggravates or creates highly concentrated markets." Bell Atlantic/NYNEX Order at 72 ¶140. The HHI is the sum of the squares of the market shares of the companies in an industry.

The Commission recently published the operating revenue shares in the long distance market. Joe Bender, "Long Distance Market Shares", Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, July 18, 1997 ("Long Distance Study"), Table 6 (table of "Operating Revenues of Long Distance Carriers

Only"). The Long Distance Study gave the four largest companies' market shares in 1996 as: AT&T: 47.9%; MCI: 20.0%; Sprint: 9.7%; and WorldCom: 5.5%, and it estimated the HHI as 2,823. If MCI's and WorldCom's shares were combined, the HHI would increase 250.50 points.

When an HHI exceeds 1800, "it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise." 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41552, 41558 ¶1.51(c) (1992). Thus, the proposed merger is far worse than the Justice Department's merger guidelines would deem acceptable, and it must be presumed to be unlawful.

Since the merger is so obviously anticompetitive in the long distance market, the merger has been presented on the theory that it might promote competition in the local market. The applicants state that

> the combined company will be well-positioned to compete against the dominant incumbents and to promote deconcentration of the local service sector. The greater resources, synergies, and efficiencies available to the combined company as a result of the merger will allow it to pursue local competition and interconnection opportunities even more aggressively than if the two companies pursued local entry individually.

Amended Merger Application, p. 8. This argument is unpersuasive, and must be rejected for four reasons.

First, it is well established that the possibility of future competition in one market is no justification for a merger which adds concentration and greatly reduces competition in another market. See Phillipsburg Bank, supra.

Second, while long distance concentration flowing from the merger is a certainty, any possible competitive benefits in local markets are entirely speculative. Nothing prevents the companies, the day after the merger closes, from making a business decision not to enter local residential markets at all -- even if the Commission finds that the likelihood of greater local competition was the touchstone for allowing the merger to occur in the first place.[17/] The Commission cannot force a company to compete in any line of business. Indeed, it appears very likely that the companies will eschew the local residential market, or compete only for the high end of that market. When WorldCom first announced its proposal to buy MCI, WorldCom's Vice Chair, John W. Sidgmore, suggested that the merged entity might well sell MCI's long distance residential customers to other long distance companies. Sidgmore said:

> We're not saying [the end of residential long distance service] is definitely going to happen on day one....[initially] we're going to market to consumers just like MCI does. On the other hand, our strategy is not in the consumer business. It's very difficult for us to find a way to make economic sense out of the advertising budgets, the customer service budgets, etc. required to be in the consumer business. We might be willing to let somebody else do the retail marketing of that consumer business.

Mike Mills, "Bidder Would Reshape MCI; WorldCom Plans to Shed

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17/ That scenario is rendered more likely by this past Saturday's decision in SBC Communications, Inc. v. U.S. West Communications, Inc. (MO&O), Civil Action No. 7:97-CV-163-X (Kendall J.) (N.D. Texas, Wichita Falls Division, December 31, 1997) ("SBC Communications") (declaring Sections 271-275 of the Act, regulating the BOCs' entry into long distance service, unconstitutional as a bill of attainder). The Commission certainly should request the applicants to set out their plans for local residential service if SBC Communications is affirmed as well as their plans if SBC Communications is reversed.

Residential Customers", Washington Post, October 3, 1997.[18]

Thus, MCI WorldCom could very well dispose of MCI's current base of about 20 million residential long distance customers, retaining only MCI's approximately 3 million business customers. Such a tactic would carry compelling business logic by providing an easy way for WorldCom to recoup the premium it proposes to pay for MCI. The sale of MCI's consumer accounts would also be consistent with WorldCom's recent acquisition of CompuServe, where WorldCom will retain the corporate accounts, transferring the consumer accounts to America Online. Indeed, MCI WorldCom could simply slow down telemarketing efforts aimed at expanding the base of long distance residential customers. Such a move would likely disproportionately and adversely affect middle and low income consumers.

On the other hand, the loss in long distance competition after the proposed merger is not speculative at all: it is real and absolutely predictable. In the long distance market, MCI and WorldCom, by merging, would be removed as competitors of one another, just as the Bell Atlantic/NYNEX merger removed NYNEX as a potential competitor to Bell Atlantic and vice versa. Bell

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18/ The next day, WorldCom quickly backpedalled, issuing a statement saying it would "not abandon MCI's residential long distance customers." Of course that statement, in a press release, is neither binding nor credible. The Commission should give more credit to Sidgmore's candid and unguarded statement than it gives to a carefully worded, backpedalling press release obviously intended for FCC consumption.

Atlantic/NYNEX Order at 6-8 ¶¶8-11.[19] The companies are asking the Commission to accept certain concentration in one market in exchange for possible competition in a market the companies are not even required to enter, and which the companies apparently do not want to enter.

Third, MCI has not shown that, without WorldCom, it is incapable of competing effectively in the local residential market, assuming it wishes to do so. Indeed, both companies already have no difficulty competing for high end business customers.[20] Both companies already provide fiber optic networks built out to large, mostly downtown, business areas. They have skimmed the business cream, providing them the revenue base to drink the residential milk.

Fourth, the companies have not shown that they must merge, and thereby stop competing in the long distance market, in order to join forces to serve local markets. The companies could joint venture to provide local service, while continuing to compete with

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19/ By reducing the number of major long distance companies from four to three, the merger "would by its own terms increase the likelihood of coordinated action among the remaining...most significant market participants to increase prices, reduce quality or restrict output. Such effects on market power remain important concerns even in a regulated market environment." Bell Atlantic/NYNEX Order at 7-8 ¶11.

20/ In evaluating the Bell Atlantic/NYNEX merger, the Commission disagreed with the applicants that the merger should be viewed as enhancing competition by permitting two ineffective long distance competitors to be one effective competitor. The applicants did not show that Bell Atlantic and NYNEX separately "would be ineffective competitors to AT&T, Sprint, MCI and other interexchange carriers." Bell Atlantic/NYNEX Order at 84-85 ¶172. For many of the same reasons, MCI and WorldCom cannot realistically claim that either of them would not be effective entrants in the local residential and local business markets.

one another for long distance service. Without explaining why this option is impossible, no case at all can be made for permitting the merger to occur.

The companies bear a heavy burden of demonstrating that the proposed merger would deliver public interest benefits which outweigh the unlawful concentration the merger would introduce into the long distance market. A transaction's positive impact on such public interest goals as promoting ownership and employment diversity might help counterbalance the transaction's public interest deficiencies.21/ Unfortunately, as discussed in §§III and IV infra, the companies have missed an opportunity to make such a showing in their application.

21/ Stockholders of Infinity Broadcasting Corp., 12 FCC Rcd 5012, 5054 ¶91 (1997) (taking into account commitments to divest stations to minorities in granting temporary multiple ownership waivers); ValueVision International, Inc., 11 FCC Rcd 14128 (1996) (granting a temporary multiple ownership waiver to Paxson Communications Corporation, which had committed to find a minority purchaser and had already entered into a Letter of Intent with a minority-owned broadcaster); Viacom, Inc., 9 FCC Rcd 1577, 1579 ¶9 (1994) (basing a temporary multiple ownership waiver, inter alia, on Viacom's pledge to "'undertake an affirmative action effort to increase the possibility of purchase of one or both of the stations by a minority-controlled entity.'...We believe that Viacom's proposal to seek out minority buyers for the two radio stations would be impossible for it to administer were we to require an immediate divestiture and we find that an 18-month period will spawn public benefits warranting grant of a temporary waiver); discussed in Viacom International, Inc. (MO&O), DA 97-1354 (MMB, released June 27, 1997) at 3-4 ¶4; Combined Communications Corporation, 72 FCC2d 637, 655-56 ¶45 (1979), recon. denied, 76 FCC2d 445 (1980).

III. The Merger Lacks Protections Against Redlining And Discrimination

A. The Temptation To Cream-Skim And Redline Will Be Irresistable Without Explicit Protections Against Such Behavior

The application is completely silent on any plans the companies might have to focus on high-end business and wealthy residential customers at the expense of small businesses and middle and low income residential customers. The application's silence on this most basic question must be read as leaving open the option, and the likelihood, of cream-skimming and redlining.

The applicants have not even promised not to discriminate based on geography. Long distance and local companies market by zip code, and local companies provide neighborhood-based switches and prefixes. Geography, then, is a predicate for business planning by both long distance and local companies.

In urban telecommunications, geography means race, thanks to six generations of housing discrimination. No one fails to acknowledge the existence of a "Black", "Hispanic" or "White" neighborhood, telephone number prefix or zip code.

Long distance marketing practices based on geography often take race into account in pernicious ways. Some long distance companies have provided larger cash bonuses to new customers with telephone number prefixes in upscale neighborhoods, or customers in upscale zip codes. This practice rewards wealth, punishes poverty, and operates as a regressive tax on residential segregation.

Local marketing and service practices are also prone to invidious race-based practices. For example, some local companies have installed new services (e.g. custom calling) first in wealthier, White neighborhoods, and last in lower income and minority neighborhoods.22/ Traditionally, local companies provided more rapid installation and repair services in wealthier, White neighborhoods. This is not ancient history: just four years ago, a coalition of national consumer and civil rights organizations presented extensive and credible evidence that some of the RBOC's, in developing the then-incipient "video dialtone" service, "propose[d] to bypass many lower income and/or minority communities in their initial deployment of video dialtone, while serving areas contiguous to those communities."23/

What is more, it is not uncommon in the long distance business for heavier users to be offered discounted service unavailable to other users -- another example of "the poor paying more." Seldom do long distance companies disclose all available rates and plans to all potential customers in plain, lay language. Unless customers ask for a special plan, they are typically assigned automatically to the least

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22/ That was the nearly universal practice of local companies until about 1980. Indeed, many local companies imposed a surcharge on all customers throughout the time new services, such as custom calling, were being implemented. But because minorities received this service last, they paid the surcharge throughout the installation period. In this way, minorities actually subsidized the headstart in service received by Whites. They literally paid a "tax on Blackness."

23/ Petition for Relief of the Center for Media Education, Consumer Federation of America, Office of Communication of the United Church of Christ, National Association for the Advancement of Colored People, and National Council of La Raza, in the Matter of Relief from Unjust and Unreasonable Discrimination in the Deployment of Video Dialtone Facilities," filed May 23, 1994 (on file with counsel) at page "i".